United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1469

To Be Argued By: Peter Goldberger

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P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR T . SECOND CIRCUIT

DOCKET NO. 76-1469

UNITED STATES OF AMERICA

PLAINTIFF-APPELLEE

-vs-

HOWARD E. HAWLEY

DEFENDANT-APPELLANT

REPLY BRIEF FOR DEFENDANT-APPELLANT

HOWARD E. HAWLEY

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ARGUMENT IN REPLY

1. Appellant's Prior Conviction for Attempted Burglary Did Not Involve "Dishonesty or False Statement" Under Fed. R. Evid. 609(a)(2) Because It Was Not "In the Nature of Crimen Falsi."

The government relies on this Court's cases decided prior to the enactment of the Federal Rules of Evidence[1/] to argue

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1/ United States v. Reed, 526 F.2d 740, 743 (2d Cir. 1975), cert. denied, 96 S.Ct. 1431 (1976); United States v. DiAngelis, 490 F.2d 1004, 1009 (2d Cir.), cert. denied, 416 U.S. 956 (1974); United States v. DiLorenzo, 429 F.2d 216, [illegible] (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971); United States v. Palumbo, 401 F.2d 270, 274 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969).

that the appellant's prior conviction for attempted burglary in the third degree was admissible under Fed. R. Evid. 609 (a)(2). This reliance is fundamentally misplaced. Rule 609 is a considered Congressional rejection of this Court's former view on the subject, in favor of a stricter standard. The government's argument wrongly assumes that this Court's former rule coincided with the Congressional category of "offense[s] in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." Conf. Rep., 4 U.S.C. Cong. & Adm. News 7051, 7103 (1974). Crimes of mere stealing (and certainly attempted stealing) are not crimen falsi. Rather, the category "describes crimes involving, or at least relating to communicative, often verbal dishonesty." Government of Virgin Islands v. Toto, 529 F.2d 278, 281 (3d Cir. 1976). Judge Aldisert's scholarly opinion in Toto draws precisely this distinction, pointing out that this Court's pre-Rule cases follow a different theory, 529 F.2d at 281 n.2, and that the new Rule 609(a) rejects those cases. Id. at 282. Appellant's prior conviction simply was not within Fed. R. Evid. 609(a)(2).

2. The Government's Brief Sheds No Light on How to Strike the Proper Balance Under Rule 609(a)(1).

None of the cases cited by the government in its discussion of Rule 609(a)(1), applying to impeachment by conviction of felonies generally, sheds any light on how a

court should balance prejudice against probative value under that part of the Rule. Gov't Br. 20-22. Only United States v. McMillian, 535 F.2d 1035, 1039 (8th Cir. 1976), and United States v. Russo, 540 F.2d 1152, 1156 (1st Cir. 1976), appear to have been decided under the Rule,[2/] and each simply announces a conclusion without demonstrating how the factors should be weighed. Under Rule 609(a)(1) the issue is whether probative value outweighs prejudice to the defendant. In this case, the factors pointing to probative value were: the conviction was a felony; it involved dishonesty in the general sense (although it was not crimen falsi), as contrasted with violence; and it was recent. On the other hand, prejudice was indicated by other factors which outweighed the probative value: the conviction involved conduct generically similar to the crime charged; it was a felony attempt of the lowest degree; the defendant's testimony was extremely important to his case; and the government's direct proof was weak. Accordingly, the admission into evidence of the appellant's prior conviction presented "a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record." Conf. Rep., supra. The testimony should have been excluded.

2/ United States v. Wilson, 536 F.2d 883, 885 (9th Cir. 1976), seems not to have involved the Rule. In United States v. Mahone, 537 F.2d 922, 928 (7th Cir. 1976), the court concluded only that Rule 609(a)(1) does not require an express finding on the record. Of course, no appellate case from 1975 or earlier applied the standard enunciated in Rule 609(a)(1), which became effective on July 1, 1975.

CONCLUSION

For the reasons stated in the appellant's principal brief and in this Reply, the conviction should be reversed.

Respectfully submitted,

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January 12, 1977

CERTIFICATION

On January 12, 1977, I mailed two copies of this Reply Brief in this case to Michael Hartmere, Esq., Assistant United States Attorney, P.O. Box 1824, New Haven, Connecticut, counsel for the appellee.